67. The underlying Commission rules being amended here (Sections 76.701 and 76.702, 47 C.F.R. §§ 76.701 and 76.702) were adopted to implement Section 10 of the 1992 Cable Act. These provisions are the subject of the litigation in *Alliance for Community Media v. FCC*. In that case, a panel of the D.C. Circuit Court of Appeals reversed and remanded the rules to the Commission on the grounds that Section 10 of the 1992 Act violated the First Amendment or raised serious constitutional questions that warranted Commission reconsideration.[77] The full court vacated the panel's judgment and found the requirements constitutional.[78] The rules were stayed after the initial decision finding them unconstitutional and that stay has been continued in force pending Supreme Court review.[79] Oral argument before the Supreme Court took place on February 24, 1996. Nothing herein is intended to affect the status of that stay. Accordingly, these rules as amended herein are stayed for as long as the *Alliance* stay remains effective.

III. NOTICE OF PROPOSED RULEMAKING

68. In this *Notice*, we propose final rules implementing certain provisions of the 1996 Act. We seek to adopt clear rules streamlining our processes, establishing certainty for cable operators, LFAs and subscribers, and effectuating the intent of Congress. A number of the issues discussed below are also the subject of the foregoing *Order*. In commenting on such issues, parties should consider the discussion and treatment of them in the *Order*.

A. Effective Competition

1. Generally

69. The new test for effective competition requires that the LEC-delivered programming be "comparable" to that of the cable operator.[80] The Conference Report states that video programming services are comparable if they "include access to at least 12 channels of programming, at least some of which are television broadcasting signals."[81] We tentatively conclude that this definition of comparable programming should be adopted. We note that after defining "comparable" in this manner, the Conference Report cites Section 76.905(g) of our rules which in fact has a slightly different definition of comparable.[82] The rule defines

---

[77] *Alliance for Community Media v. FCC*, 10 F.3d 812 (D.C. Cir. 1993).

[78] *Alliance for Community Media v. FCC*, 56 F.3d 105 (D.C. Cir. 1995).

[79] *Alliance for Community Media v FCC*, Case No. 93-1169 (D.C. Cir. July 10, 1995).

[80] 1996 Act, 301(b)(3), *to be codified at* Communications Act, § 623(l)(1).

[81] Conference Report at 170.

[82] 47 C.F.R. § 76.905(g).

"comparable" as meaning a minimum of 12 channels of programming, "including at least one channel of nonbroadcast service programming."[83] Commenters should consider this factor in addressing the meaning of "comparable" programming for purposes of the new test for effective competition.

70. In light of our tentative conclusion that "comparable programming" requires access to broadcast channels, commenters should address whether this could include satellite-delivered broadcast channels (e.g., "superstations"). In the same context, commenters should address whether an MMDS subscriber should be deemed a recipient of "comparable programming" if the broadcast stations are received by way of an over-the-air antenna located at the subscriber's residence, rather than as part of the MMDS operator's microwave signals. Would it matter if the antenna was provided by the subscriber as opposed to the MMDS operator? We believe that a single definition of "comparable programming" should apply to both prongs of the effective competition test in which that term is used. Commenters who disagree with this conclusion should provide a justification for having a different definition of comparable programming in different prongs of the effective competition test.

71. We tentatively conclude that the new test for effective competition applies with equal force regardless of whether the LEC or its affiliate is merely the video service provider, as opposed to the licensee or owner of the facilities. We seek comment on this tentative conclusion. Further, we seek comment as to whether the type of service provided by, or over the facilities of, the LEC or its affiliate should be relevant. For example, we seek comment as to whether satellite master antenna television ("SMATV") systems constitute direct-to-home satellite services and hence do not fall within the class of video providers that can be a source of effective competition under the new test.[84]

72. In accordance with the Conference Report, the term "offer" will be applied as currently defined by Section 76.905(e) of the Commission's Rules, 47 C.F.R. § 76.905(e).[85] In the *Order*, we have established interim standards by which cable operators may show that the competing MVPD is offering service in the franchise area, based on the statutory requirements. Accordingly, we seek comment on whether we should follow these standards for purposes of the permanent rule. We note that the new definition of effective competition does not, unlike the other three effective competition tests, include a percentage pass or penetration rate. We seek comment as to whether Congress intended effective competition to be found if a LEC's, or its affiliate's, service was offered to subscribers in any portion of the franchise area, or whether the competitor's service must be offered to some larger portion of the franchise area to constitute effective competition. In addressing this issue, commenters

---

[83] *Id.*

[84] *See* Third Order on Reconsideration in MM Docket Nos. 92-266 & 92-262, FCC 94-40, 9 FCC Rcd 4316, 4322 (1994).

[85] Conference Report at 170.

should consider what level of competition provided by a LEC or its affiliate is sufficient to have a restraining effect on cable rates. Commenters also should address the likelihood that an incumbent cable operator's response to the presence of a competitor may depend not just upon the current pass rate of the competitor, but also on its potential pass rate. That is, a LEC that offers service to 5% of the residents in a franchise area and that, due to technical constraints, will never exceed this reach would seem to pose less of a competitive threat than a LEC with a 5% pass rate that eventually will be able to offer service throughout the franchise area. We seek comment as to whether to take account of this factor in implementing the new test for effective competition.

73. We have adopted interim filing procedures by which regulated operators may seek to establish the presence of effective competition under the new statutory test. We tentatively conclude that we should adopt these procedures as a final rule and conform our existing procedures[86] accordingly, such that all tests for effective competition would be determined in a uniform manner. We seek comment on this tentative conclusion.

2. Definition of "Affiliate"

74. With respect to the definition of "affiliate" for purposes of the new prong of the effective competition test, we note that the 1996 Act does not specifically alter the following definition of "affiliate" which remains applicable for purposes of cable regulation under Title VI of the Communications Act:

> the term "affiliate," when used in relation to any person, means another person who owns or controls, is owned or controlled by, or is under common ownership or control with, such person:[87]

75. Although this definition remains unchanged, the following definition of "affiliate" is now found in Title I as a result of the enactment of the 1996 Act:

> The term "affiliate" means a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person. For purposes of this paragraph, the term "own" means to own an equity interest (or the equivalent thereof) of more than 10 percent.[88]

76. As engrafted into Sec. 3 of the Communications Act, this definition of "affiliate" now applies "[f]or purposes of this [Communications] Act, unless the context

---

[86] 47 C.F.R. § 76.915

[87] Communications Act, § 602(2); *see supra* at para. 12.

[88] 1996 Act, § 3(a)(2), *to be codified at* Communications Act, § 3(33).

otherwise requires . . . ."[89] Commenters should address whether, for purposes of the new effective competition test, "the context . . . require[s]" a definition of "affiliate" other than the one now contained in Title I.

77. We tentatively conclude that the Title I definition of "affiliate" should be adopted for purposes of the new effective competition test. While we do not believe that Congress mandated the use of this definition for purposes of Title VI, incorporating the Title I definition for purposes of Title VI is not inconsistent with Congressional intent and would create some uniformity throughout the Commission's rules. We also tentatively conclude that both passive and active ownership interests are attributable and seek comment accordingly. We also seek comment on whether a beneficial interest in a cable operator would be "equivalent" to an equity interest under this proposed definition of "affiliate" and, if so, how "beneficial interest" should be defined. Commenters should address whether the affiliation standard has to be met by a single LEC or whether the interests of more than one LEC can be aggregated.

B. CPST Rate Complaints

78. In the *Order*, we amended our rules to conform them to statutory requirements, regarding the filing of rate complaints by LFAs. We also adopted interim procedures to govern our implementation of this provision pending final rules. Here we propose to adopt the interim rules as final rules and solicit comment accordingly.

79. In addition to addressing the interim procedures, parties should comment on whether we should establish a deadline by which LFA complaints must be filed. Although Section 301(b)(1)(C) permits the LFA to file a CPST rate complaint with the Commission only if the LFA has received subscriber complaints within 90 days of a CPST rate increase, it specifies no deadline for the LFA complaint. Commenters should propose possible deadlines, taking into account the steps that a LFA may be required to follow following the close of the 90-day window on subscriber complaints in order to file its own complaint with the Commission. Finally, because Section 301(b)(1)(C) alters the rate complaint process, we propose eliminating the requirement contained in Section 76.952 of our rules that operators must include the name, mailing address, and telephone number of the Cable Services Bureau of the Commission on monthly subscriber bills.[90]

---

[89] Communications Act, § 3. *See* 1996 Act. § 3 (b).

[90] 47 C.F.R. § 76.952. *See supra*, Sec. II B. The Cable Services Bureau of the Commission released a Public Notice recognizing that, according to the 1996 Act, cable operators should no longer inform subscribers that they may place complaints directly with the Cable Services Bureau. *See* Public Notice, Report No. CS 96-12 (February 27, 1996). In addition, operators need not include the name, address and phone number of the Commission on subscriber bills, at least pending the adoption of a final rule in this proceeding. *Id.*

C. Small Cable Operators

1. National Subscriber Count

80. Here we propose specific rules to clarify implementation of Section 301(c) which provides for greater deregulation of small cable operators. We first must determine the method by which we will establish the total number of cable subscribers in the United States, since only operators serving fewer than 1% of all subscribers qualify as small cable operators.[91] We propose to establish such a number on an annual basis and to have that number serve as the applicable threshold until a new number is calculated the following year. While the number of subscribers varies daily, we tentatively conclude that fixing a number on an annual basis will produce certainty and reduce administrative burdens for operators, LFAs, and the Commission. Commenters should address these tentative conclusions and propose any reasonable alternatives.

81. As noted, the method we select to count the total number of subscribers should minimize administrative burdens as well as ensure a subscriber count that is as accurate and reliable as is reasonably possible. We are aware that industry groups, trade journals, and other private concerns already attempt to track subscriber figures. We tentatively conclude that using the most reliable of these figures, or perhaps some average of these figures, would best further our goals. We solicit comment on this tentative conclusion and on what data would be the most reliable for this purpose.

2. Definition of "Affiliate"

82. In addition, we seek comment on the proper definition of "affiliate" for purposes of the small operator provisions.[92] We already have discussed the separate definitions of "affiliate" contained in Title I and Title VI.[93] We note that the Title I definition of "affiliate" does not strictly apply to matters under Title VI, since Title VI contains a separate definition of that term that, unlike the Title I definition, does not set a percentage threshold as to what constitutes ownership.[94] We believe this gives us discretion to establish a percentage ownership threshold other than 10% for purposes of Title VI.[95]

---

[91] 1996 Act, § 301(c), *to be codified at* Communications Act, § 623(m)(2).

[92] *Id.*

[93] *See supra* at para. 15-16, 74-77.

[94] Communications Act, § 602(2).

[95] *See supra* at para. 16.

83. As for the precise threshold we should establish here, we note that last year in applying the Title VI definition in the context of our small system rules, we concluded that a 20% ownership interest, active or passive, would be deemed affiliation. There we observed: "Relaxing regulatory burdens should free up resources that affected operators currently devote to complying with existing regulations and should enhance those operators' ability to attract capital, thus enabling them to achieve the goals of Congress . . . ."[96] We believe that Congress had a similar intent when it crafted the small cable operator provisions of the 1996 Act and, therefore, we tentatively conclude that the affiliation standard applicable under our small system cost-of-service rules also should be applied for present purposes. Under this approach, an entity would be affiliated with a cable operator if the entity held an ownership interest of 20% or more, either active or passive, in the cable operator. De facto control also would constitute affiliation. We seek comment on this proposed definition.

3. Definition of "Gross Revenues"

84. Once a cable operator identifies its affiliates under whatever rule we adopt, it will have to calculate the gross annual revenues of those affiliates. We have defined "gross revenues" in other contexts, such as determining eligibility for certain licenses for frequencies devoted to personal communications services:

> Gross revenues shall mean all income received by an entity, whether earned or passive, before any deductions are made for costs of doing business (e.g., cost of goods sold), as evidenced by audited quarterly financial statements for the relevant period.[97]

85. We tentatively conclude that this definition should be applied under the small cable operator provisions of the 1996 Act, although we do not intend to require that all entities produce audited financial statements. If an entity maintains such statements as a matter of course, they would seem to be the best record of its gross revenues. However, we realize that some smaller business may not go to the expense of having their financial statements audited; certainly they should not be required to do so on the basis of legislation intended to minimize burdens for smaller businesses. Therefore, we propose to adopt the definition of "gross revenues" quoted above, as modified to eliminate any requirement that the operator or its affiliates produce audited financial statements. Commenters should address the propriety of this definition for establishing operator eligibility for small cable operator treatment. We also seek comment as to how the revenues of natural persons should be measured and verified under this rule.

86. The plain language of the statute appears to require an operator with multiple

---

[96] *Small System Order*, 10 FCC Rcd at 7407.

[97] 47 C.F.R. § 76.720(f).

affiliates to aggregate the gross annual revenues of all of the affiliates and to compare this aggregate figure to the $250 million threshold.[98] We tentatively conclude that if the gross revenues of all affiliates, when aggregated in this manner, exceed $250 million, the operator does not qualify as small, even if no single affiliate has revenues in excess of that amount. We also solicit comment as to whether the statute should be read to exclude the revenues of the operator itself for purposes of applying the $250 million threshold. Finally, we solicit comment on whether only affiliates of the cable operator that are also cable operators should be included when aggregating gross annual revenues with respect to the $250 million threshold.

4. System and Franchise Area Subscribers

87. Rate regulation is reduced or eliminated for a small cable operator "in any franchise area in which that operator services 50,000 or fewer subscribers."[99] Although a single cable system can serve more than one franchise area, deregulation under this provision of the 1996 Act appears to be determined on a franchise area-by-franchise area basis, without regard to the total number of system subscribers. Under this analysis, a system serving well over 50,000 subscribers spread over multiple franchise areas could qualify for deregulation throughout the entire system as long as no individual franchise area contained more than 50,000 subscribers. Likewise, a single system could be subject to regulation in one franchise area but not in another because its subscriber counts are over and under the 50,000 mark in the two areas, respectively. We seek comment on our tentative conclusion that system size is irrelevant for purposes of this provision.

88. In other contexts in which subscriber counts are important, such as determining whether effective competition exists in a franchise area, we have directed operators how to measure subscribership to take account of various circumstances, such as in vacation areas that experience seasonal shifts in population.[100] However, in limited circumstances we have allowed operators to count subscribers residing in multiple dwelling units ("MDUs") based on the equivalent billing unit methodology.[101] We seek comment on the proper methodology to be used for purposes of the 50,000 subscriber limit under Section 301(c).

5. BST and CPST deregulation

89. The 1996 Act plainly eliminates CPST rate regulation for systems that qualify

---

[98] 1996 Act, § 301(c), *to be codified at* Communications Act, § 623(m)(2).

[99] 1996 Act, § 301(c), *to be codified at* Communications Act, § 623(m)(1).

[100] 47 C.F.R. § 76.905(c).

[101] Questions and Answers on Cable Television Regulation, pp. 1-2 (rel. July 27, 1994).

under the revenue and subscriber criteria.[102] For qualifying systems that do not offer a CPST, the statute eliminates BST regulation if that tier "was the only service tier subject to regulation as of December 31, 1994 . . . ."[103] With respect to qualifying systems that had only a single tier subject to regulation as of that date, we seek comment as to whether Congress intended the BST to be deregulated even if the operator has created a CPST since then or creates a CPST hereafter. In other words, can a qualifying system with both a BST and a CPST be exempt from rate regulation on both tiers, as long as it had only a single tier as of December 31, 1994? Assume, for example, that as of December 31, 1994 an operator had only a single regulated tier, consisting of all of the channels that an operator is required to carry on its BST[104] plus a large number of additional channels. Thereafter, the operator creates a CPST and migrates from the BST to the new CPST some or all of the channels that are not mandatory BST channels, including all of the most popular satellite-delivered cable networks. Arguably, the system's resulting BST would be exempt from regulation on the grounds that the BST "was the only service tier subject to regulation as of December 31, 1994 . . . ." It is also arguable, however, that the resulting BST should be subject to regulation because the fundamental nature of the original BST was significantly altered after December 31, 1994.

90. We tentatively conclude that the scope of deregulation depends solely upon the number of tiers that were subject to regulation as of December 31, 1994. Under this construction of the statute, a system currently offering two or more tiers would be deregulated on all tiers if the BST was the only tier subject to regulation as of December 31, 1994, but would be deregulated only on its CPST(s) if it had more than one tier subject to regulation as of December 31, 1994. We seek comment on this construction of the statute.

6. Procedures

91. As for procedures, we seek to design a mechanism by which an operator can obtain a prompt determination of small operator status with a minimum of paperwork, while still giving LFAs and the Commission the ability to verify, when necessary, the subscriber and revenue data relied on by the operator in seeking such status. We understand that a large number of operators entitled to deregulation under the 1996 Act have subscriber and revenue figures that fall far below the statutory thresholds. We tentatively conclude that the procedures we adopt in this regard should be such that these systems can obtain a prompt declaration of their deregulatory status without having to comply with the rules that may be necessary for systems whose eligibility is not so certain. Accordingly, we propose to adopt

---

[102] 1996 Act, § 301(c), *to be codified at* Communications Act, § 623(m)(1)(A).

[103] 1996 Act, § 301(c), *to be codified at* Communications Act, § 623(m)(1)(B).

[104] *See* Communications Act, 623(b)(7) (mandating carriage of certain channels on the BST).

on a permanent basis the interim procedures described above.[105]

92. While designed to simplify the process in the case of operators who clearly meet the statutory criteria, this process could be applied to all operators, even though further scrutiny may be required for operators that come closer to those statutory criteria. We seek comment on this approach and invite commenters to propose other mechanisms that would minimize the administrative burdens on operators and franchising authorities, particularly in cases where there will be no dispute as to the operator's eligibility for deregulation. We further seek comment as to the procedures to be followed where a determination of the operator's status will require further examination.

93. We also must determine the treatment of systems that qualify for deregulation now, but later exceed the subscriber or revenue thresholds. We tentatively conclude that the plain language of the statute indicates that a deregulated system would become subject to regulation upon exceeding the statutory thresholds. Under this approach, would a system that qualifies for deregulation instantly lose that status the moment its subscriber base exceeds 50,000 in the franchise area, or at the moment its operator starts to serve more than 1% of subscribers nationwide? Is deregulated status lost immediately upon the accumulation of annual revenues above $250 million? We tentatively conclude that an instantaneous shift from complete deregulation to full regulation may not be in the public interest because it could be disruptive to consumers and operators. The addition of subscribers by a system or operator would seem to indicate that the company is responding to consumer demand. We would not want to discourage such responsiveness on the part of cable operators. Nevertheless, we tentatively conclude that the language of the 1996 Act requires the transition into regulation to begin as soon as the system no longer qualifies under the subscriber or revenue criteria. We seek comment on these issues.

94. We note that last year the Commission adopted rules streamlining cost-of-service rate regulation for any system serving fewer than 15,000 subscribers, as long as the system is not owned by an operator serving more than 400,000 subscribers.[106] Once a system qualifies under these criteria, it remains subject to the relaxed rules for so long as the system serves fewer than 15,000 subscribers.[107] When the system exceeds 15,000 subscribers, it may maintain its current rates, but it is then subject to our standard rate rules applicable to systems generally, and therefore cannot seek an increase until such an increase is permitted under our

---

[105] *See supra* at Sec. II. C.

[106] *See supra* at para. 32. Obviously, a large number of systems in this category will qualify for partial or total deregulation under the small cable operator provisions of the 1996 Act.

[107] *Small System Order*, 10 FCC Rcd at 7413.

standard rate rules.[108] We seek comment as to whether this transition mechanism could be applied to systems when they exceed the statutory criteria, or whether some other approach would be more appropriate.

D. Definition Of "Affiliate" In The Context Of Open Video Systems And Cable-Telco Buy Outs

95. We recently initiated a rulemaking to implement the provisions of Section 302(a) of the 1996 Act establishing open video systems.[109] Open video systems represent a new medium for the provision of video programming to subscribers. The 1996 Act specifically authorizes a LEC to provide cable service over an open video system within its own telephone service area.[110] The 1996 Act also provides that, to the extent permitted by Commission regulation, a cable operator or any other person may provide video programming through an open video system.[111] As with other portions of the 1996 Act, Section 302(a) requires that we define the term "affiliate" in order to implement its provisions. Although Section 3 of the 1996 Act defines "affiliate," Congress did not alter the separate definition of "affiliate" set forth in Title VI.[112] Thus, we solicit comment regarding the definition of "affiliate" in the context of the new statutory provisions governing open video systems.

96. The cable-telco buy out provisions of Section 302 of 1996 Act also refer to the "affiliates" of such entities. We request comment regarding the definition of "affiliate" in this context as well.

E. Uniform Rate Requirement

97. As discussed above, Section 301(b)(2) of the 1996 Act amends the pre-existing requirement that a cable operator maintain a uniform rate structure throughout its franchise area by, among other things, exempting from that requirement bulk discounts offered to multiple dwelling units. We have amended the rule to comfort with the exact statutory language. Here we solicit comment on the meaning of several terms in the statutory language.

98. We tentatively conclude that the bulk rate exception does not permit a cable

---

[108] *Id.* at 7428.

[109] Report and Order and Notice of Proposed Rulemaking in CS Docket No. 96-46, FCC 96-99 (rel. March 11, 1996).

[110] 1996 Act, § 302(a), *to be codified at* Communications Act, § 653(a)(1).

[111] *Id.*

[112] *See supra* at Sec. II(A)(3) and II(C)(2).

operator to offer discounted rates on an individual basis to subscribers simply because they are residents of a multiple dwelling unit, but rather requires a "bulk discount[ ]," to use the language of the statute, that is negotiated by the property owner or manager on behalf of all of the tenants. We seek comment on this tentative conclusion. We also seek comment as to whether the bulk discounts permitted under Section 301(b)(2) include discounts offered to MDU residents who are billed individually, or should only be permitted where the discount is deducted from a bulk payment paid to the cable operator by the property owner or manager on behalf of all of its tenants.

99. We further seek comment as to the meaning of the term "multiple dwelling units" as used in Section 301(b)(2). The Commission has a long-standing definition of "multiple unit dwellings" that historically has been significant in determining whether certain cable facilities fell within the private cable exemption to the definition of a cable system.[113] As noted above, prior to the passage of the 1996 Act the definition of a cable system excluded facilities serving subscribers "in 1 or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities uses any public right of way . . . ."[114] In that context, we defined a multiple unit dwelling to include a single building that contains multiple residences, and to exclude developments consisting of detached single-family residences, such as mobile home parks, planned and resort communities, and military installations.[115] Congress now has expanded the private cable exemption to include all facilities located wholly on private property, without regard to the nature or common ownership of the property served.[116] Thus, operators of private cable systems (e.g., SMATV systems) now may serve mobile home parks and planned developments without being subject to regulations applicable to cable systems. Since Section 301(b)(2) clearly authorizes a cable operator to deviate from its standard rate structure in order to respond to competition at multiple dwelling units, commenters should address whether we should interpret "multiple dwelling units" to correspond to the expanded private cable exemption to the cable system definition.

100. Substantively, we believe that allegations of predation should be made and reviewed under principles of federal antitrust law as applied and interpreted by the federal courts. Commenters should address what standards should be applied to determine whether a complainant has made out a prima facie case "that there are reasonable grounds to believe that

---

[113] *See* First Report and Order in Docket No. 20561, FCC 77-205, 63 FCC 2d 956, 996-97 (1977).

[114] *See supra* at Sec. II, J.

[115] *See* First Report and Order in Docket No. 20561, 63 FCC 2d at 996-97; *In Re Massachusetts Community Antenna Television Commission*, FCC 87-372, 2 FCC Rcd 7321 (1987).

[116] *See supra* at Sec. II, J.

the discounted price is predatory . . . ."[117] Because complaints in this connection are likely to involve some measure of discovery, we propose the adoption of procedures set forth in our rules for the adjudication of program access complaints.[118] Commenters should address whether that section, or some modified version of procedures set forth in that section, should apply on a permanent basis.

F. Technical Standards

101. The Commission has adopted technical standards that govern the picture quality performance of cable television systems. The rules generally have preemptive force in situations where there is any conflict between the Commission's requirements and those that might be imposed by state or local governments.[119] Section 624(e) of the Communications Act, as adopted in the 1992 Cable Act, provided that the Commission should prescribe minimum technical standards.

102. Current Commission rules dictate specific technical standards and provide for enforcement by LFAs.[120] For example, the Commission's rules provide that, upon request by a LFA, an operator must be prepared to demonstrate compliance with the Commission's technical standards.[121] In addition, the rules provide that, in some instances, an operator may negotiate with its LFA for standards less stringent than otherwise prescribed by the Commission's rules.[122] Section 76.607 of the Commission's rules require an operator to establish a process for receiving signal quality complaints, and subscriber complaints must be referred to the franchising authority and the operator before being referred to the Commission.[123]

103. In the *Order* issued herewith, we eliminate, pursuant to the 1996 Act, the language in Note Six of Section 76.605 of our rules, which states that "[a] franchising authority may apply to the Commission for a waiver to impose cable technical standards that

---

[117] 1996 Act, § 301(a)(2), *to be codified at* Communications Act, § 623(d).

[118] *See* 47 C.F.R. § 76.1003.

[119] *See e.g.,* City of New York v. FCC, 486 U.S. 57 (1988); In the Matter of Cable Television Technical and Operational Requirements--Review of Technical and Operational Requirements of Part 76, Report and Order in Docket 91-169, 7 FCC Rcd 2021 (1992).

[120] 47 C.F.R. § 76.601-76.630.

[121] 47 C.F.R. § 76.601(a),(d) and (Note).

[122] 47 C.F.R. § 76.605 (Notes 1 and 2).

[123] 47 C.F.R. § 76.607

are more stringent than the standards prescribed by the Commission." We replace that language with the new language in Section 301(e) of the 1996 Act.[124]

104. Here, we seek comment on the overall scope and meaning of new Section 624(e) of the Communications Act, as amended by Section 301(e) of the 1996 Act. For example, how does this provision affect the Commission rules cited above? How does the 1996 Act's amendments to Section 624(e) affect the scope of the cable franchising, renewal or transfer process in the area of the technical considerations allowed in those situations? Commenters should bear in mind that the 1996 Act did not amend the franchising or the renewal provisions of the Communications Act. Specifically, Section 626 of the Communications Act provides that, "subject to Section 624" an operator's proposal for franchise renewal "shall contain such material as the franchising authority may require, including proposals for upgrade of the cable system."[125] In addition, Section 626 provides for franchising authority consideration of the "quality of the operator's service, including signal quality" during the course of a renewal under Section 626.[126] Section 621 provides, in part, that a franchising authority awarding a franchise "may require adequate assurance that the cable operator has the. . . technical. . . qualifications to provide cable service."[127]

G. Prior Year Losses

105. Section 301(k)(1) of the 1996 Act amends Section 623 of the Communications Act by adding the following provision:

> (n) Treatment of Prior Year Losses.--Notwithstanding any other provision of this section or of section 612, losses associated with a cable system (including losses associated with the grant or award of a franchise) that were incurred prior to September 4, 1992, with respect to a cable system that is owned and operated by the original franchisee of such system shall not be disallowed, in whole or in part, in the determination of whether the rates for any tier of service or any type of equipment that is subject to regulation under this section are lawful.

106. This amendment was effective upon enactment and "shall be applicable to any rate proposal filed on or after September 4, 1993, upon which no final action has been taken

---

[124] *See supra*, Sec. II F.

[125] Communications Act, § 626(b)(2).

[126] Communications Act, § 626(c)(1)(B).

[127] Communications Act, § 621(a)(4)(C).

by December 1, 1995."[128]

107. We note that this provision is similar to a rule change we recently made in the *Second Report and Order, First Order on Reconsideration, and Further Notice of Proposed Rulemaking* ("*Final Cost Order*") that we adopted in December, 1995.[129] The *Final Cost Order* established final rules applicable to operators that establish regulated rates in accordance with our cost of service rules, one of the two general approaches we have implemented with respect to rate regulation. The other, and primary, method of rate regulation is the benchmark approach. The cost of service rules, intended as a safety valve for operators unable to generate reasonable revenues under the benchmark mechanism, involve a detailed analysis of an operators investment, expenses, and revenues. One of the issues in such an analysis is the extent to which an operator should be permitted to recover "start up losses" incurred by the system. Start up losses occur in the early years of operation when rates are set more to attract customers than to fully cover the significant capital and operating costs that an operator incurs before and in the first years after initiating service.[130] Prior to adoption of the *Final Cost Order*, we presumptively limited the recovery of start up losses to those losses incurred in the first two years of operation.[131] We eliminated this presumption in the *Final Cost Order* and now permit operators to recover start up loses over whatever period of time such losses were actually incurred.[132]

108. We tentatively conclude that the statutory requirement of Section 301 (k)(1) is applicable to an operator's cost-of-service justification, but differs somewhat from the rule adopted in the *Final Cost Order*. First, our rule permitting the recovery of start up losses applies to all cable operators, while the recovery of prior year losses under Section 301(k)(1) is limited to "a cable system that is owned and operated by the original franchisee of the system." Second, under our existing rule, reasonable start up losses may be recovered regardless of when they were incurred, while Section 301(k)(1) permits the recovery only of losses incurred prior to September 4, 1992. Third, while start up losses are those incurred in the early years of a system's operation, Section 301(k)(1) contains no such limitation. We seek comment on these tentative conclusions. Further, we seek comment as to whether

---

[128] 1996 Act, § 301(k)(2).

[129] *See* Second Report and Order, First Order on Reconsideration, and Further Notice of Proposed Rulemaking in MM Docket 93-215, FCC 95-502, para. 64-72 (rel. January 26, 1996); *see also* Media General Cable of Fairfax ("*Media General*"), FCC 96-13, para. 14-19 (rel. January 26, 1996).

[130] *Final Cost Order*, at para. 64; *Media General*, at para. 17.

[131] Report and Order and Further Notice of Proposed Rulemaking in MM docket no. 93-215 and CS Docket no. 94-28 , FCC 94-39, 9 FCC Rcd 4527, 4563-65 (1994).

[132] *Final Cost Order*, at para. 71-72.

Congress intended to permit the recovery of prior year losses attributable to imprudent or unreasonable expenditures.

H. Advanced Telecommunications Incentives

109. Subsection 706(a) of the 1996 Act requires the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."[133] We seek comment on how we can advance Congress' goal within the context of our cable services regulation. The Commission has solicited such information in other proceedings and reserves its right to address the implementation of Subsection 706(a) in a consolidated action.

I. Cable Operator Refusal To Carry Certain Programming

110. In the *Order*, we amended our rules to conform them to the statutory requirements regarding cable operator refusal to carry programming that contains nudity on leased access channels and public, educational, and government ("PEG") access channels. Here we solicit comment on the proper interpretation of the term "nudity" as used in Sections 506(a) and (b) of the 1996 Act.

111. We tentatively conclude that the term "nudity" should be interpreted in accordance with the decision of the Supreme Court in *Erznoznik v. City of Jacksonville*.[134] In that decision, the Supreme Court found invalid a city ordinance that prohibited showing films containing nudity at drive-in theaters visible from public places. The Court found the restriction overly broad because it was not directed against sexually explicit nudity or otherwise limited. Accordingly, we tentatively conclude that the term "nudity" as used in Sections 506(a) and (b) of the 1996 Act should be interpreted to mean nudity that is obscene or indecent. We seek comment on this tentative conclusion.

J. Other Matters

112. We recognize that the cable reform subsections of the 1996 Act that we address in this *Notice* are broad in scope, and that there may be additional issues regarding those subsections that we have not specifically addressed in the *Notice*. Commenters may submit proposals or concerns regarding the implementation of these cable reform subsections,

---

[133] 1996 Act, § 706(a).

[134] 422 US 205, 95 S. Ct. 2278 (1975).

including their impact on other parts of the 1996 Act that are to be addressed in separate proceedings. We also seek proposals to ease the burdens of regulation for interested parties.

IV. REGULATORY FLEXIBILITY ANALYSES

A. Initial Regulatory Flexibility Analysis for the Notice of Proposed Rulemaking

113. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. §§ 601-612, the Commission's Initial Regulatory Flexibility Analysis with respect to the Notice is as follows:

114. Reason for action: The Commission is issuing this Notice to seek comment on various issues concerning implementation of the 1996 Act.

115. Objectives: To provide an opportunity for public comment and to provide a record for a Commission decision on the issues discussed in the Notice.

116. Legal Basis: The Notice is adopted pursuant to Section 301 of the 1996 Act; and sections 4(i), 602, 614, 617, 623, 624, 628, 632, of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154, 522, 534, 537, 543, 544, 548, 552, and 548.

117. Description, potential impact, and number of small entities affected: Amending our rules will directly affect entities which are small business entities, as defined in Section 601(3) of the Regulatory Flexibility Act. The 1996 Act reduces or eliminates rate regulation for many such entities.

118. Reporting, recordkeeping, and other compliance requirements: None.

119. Federal rules which overlap, duplicate, or conflict with the Commission's proposal: None.

120. Any significant alternatives minimizing the impact on small entities and consistent with state objectives: The Notice seeks to minimize burdens on small entities in conformance with the 1996 Act.

121. Comments are solicited: Written comments are requested on this Initial Regulatory Flexibility Analysis. These comments must be filed in accordance with the same filing deadlines set for comments on the other issues in this Notice, but they must have a separate and distinct heading designating them as responses to the Regulatory Flexibility Analysis. The Secretary shall send a copy of the Notice to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, 5 U.S.C. § 601, *et seq.*

B. Final Analysis for the Order

122. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. §§ 601-612, the Commission's Flexibility Analysis with respect to the Order is as follows:

123. Need and purpose of this action: The Commission issues this Order to enact or revise rules in response to the 1996 Act.

124. Significant Alternatives considered: Not applicable because action is taken pursuant to statutory directive.

125. Federal rules that overlap, duplicate or conflict with these rules: None.

V. INITIAL PAPERWORK REDUCTION ACT OF 1995 ANALYSIS

126. This Order and Notice contain either proposed or modified information collections. The Commission has obtained Office of Management and Budget (OMB) approval, under the emergency processing provisions of the Paperwork Reduction Act of 1995 (5 CFR 1320.13), of the information contained in this rulemaking. Approval is effective no later than the date that the summary for the Order and Notice appears in the Federal Register. Emergency OMB approval for the information collections expires June 30, 1996. The Commission, as part of its continuing effort to reduce paperwork burdens and to obtain regular OMB approval of the information collections, invites the general public and OMB to comment on the information collections contained in this rulemaking, as required by the Paperwork Reduction Act of 1995. Public and agency comments are due at the same time as other comments on this Order and Notice; OMB notification of action is due 60 days from date of publication of this Notice in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

VI. EFFECTIVE DATE

127. The statutory requirements reflected in the final rules adopted in the *Order* were effective February 8, 1996, the date of enactment of the 1996 Act. The interim rules adopted in the *Order* are effective upon publication of the *Order* in the Federal Register. We find good cause for making these rule changes effective upon publication in the Federal Register because the rules merely either implement statutory language from the 1996 Act, or establish interim procedures (pending the adoption of final rules) in response to immediately effective statutory provisions in the 1996 Act. We also find notice and comment is not necessary or in the public interest in this limited context. Accordingly, the Commission will forgo notice and comment pursuant to the "good cause" exception of the Administrative

Procedure Act. *See* 5 U.S.C. § 553(d).

VII. PROCEDURAL PROVISIONS

128. *Ex parte Rules - Non-Restricted Proceeding.* This is a non-restricted notice and comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided that they are disclosed as provided in Commission's rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

129. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before May 28, 1996 and reply comments on or before June 28, 1996. To file formally in this proceeding, you must file an original and six copies of all comments, reply comments, and supporting comments. Parties are also asked to submit, if possible, draft rules that reflect their positions. If you want each Commissioner to receive a personal copy of your comments, you must file an original and eleven copies. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C. 20554, with a copy to Nancy Stevenson of the Cable Services Bureau, 2033 M Street, N.W., Room 408A, Washington, D C. 20554. Parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, International Transcription Services, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, 1919 M Street, N.W., Room 239, Washington, D.C. 20554.

130. Parties are also asked to submit comments and reply comments on diskette, where possible. Such diskette submissions would be in addition to and not a substitute for the formal filing requirements addressed above. Parties submitting diskettes should submit them to Nancy Stevenson of the Cable Services Bureau, 2033 M Street, N.W., Room 408A, Washington, D.C. 20554. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible form using MS DOS 5.0 and WordPerfect 5.1 software. The diskette should be submitted in "read only" mode. The diskette should be clearly labelled with the party's name, proceeding, type of pleading (comment or reply comments) and date of submission. The diskette should be accompanied by a cover letter.

131. Written comments by the public must be submitted by the Office of Management and Budget (OMB) on the proposed and/or modified information collections on or before 60 days after publication of the Order and Notice in the Federal Register. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Dorothy Conway, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, D.C. 20054, or via the Internet to dconway@fcc.gov, and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725-17th Street, N.W., Washington, D.C. 20503 or via the Internet to fain_t@al.eop.gov.

VIII. ORDERING CLAUSES

132. IT IS ORDERED that pursuant to Section 301 of the 1996 Act; and Sections 4(i), 602, 623, 624, 628, 632, of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154, 522, 543, 544, 548 and 552, NOTICE IS HEREBY GIVEN of proposed amendments to Part 76, in accordance with the proposals, discussions, and statements of issues in this Notice and that COMMENT IS SOUGHT regarding such proposals, discussion, and statements of issues.

133. Pursuant to sections 4(i), 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), and Telecommunications Act of 1996, § 301, IT IS FURTHER ORDERED that the Commission's Rules ARE AMENDED as set forth in Appendix A, EFFECTIVE upon publication in the Federal Register.

134. IT IS FURTHER ORDERED that we are revising these rules without providing prior public notice and an opportunity for comment because the rule modifications are mandated by the applicable provisions of the 1996 Act. We find that notice and comment procedures are unnecessary, and that therefore this action falls within the "good cause" exception of the Administrative Procedure Act. 5 U.S.C. § 553(b)(B). The final rules adopted in this *Order* do not involve discretionary action on the part of the Commission. Rather, they simply implement provisions of the 1996 Act according to the specific terms set forth in the legislation, or establish interim procedures (pending the adoption of final rules) in response to immediately effective statutory provisions in the 1996 Act.. For the same reasons, we find good cause to make the rules effective upon publication in the Federal Register.

135. IT IS FURTHER ORDERED that the Secretary shall send a copy of this Notice, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §§ 601, *et seq.* (1981).

136. For additional information regarding this proceeding, contact Tom Power, Paul Glenchur, or Nancy Stevenson, Policy and Rules Division, Cable Services Bureau (202) 416-0800.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

Part 76 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 76 -- CABLE TELEVISION SERVICE

1. The authority citation for Part 76 continues to read as follows:

AUTHORITY: Secs. 2, 3, 4, 301, 303, 307, 308, 309, 48 Stat., as amended, 1064, 1065, 1066, 1081, 1082, 1083, 1084, 1085, 1101; 47 U.S.C. § 152, 153, 154, 301, 303, 307, 308, 309; Secs. 612, 614-615, 623, 632 as amended, 106 Stat. 1460, 47 U.S.C. 532; Sec. 623, as amended, 106 Stat. 1460; 47 U.S.C. 532, 533, 535, 543, 552.

2. Section 76.5 is amended by revising paragraphs (a) and (ff) to read as follows:

Sec. 76.5 Definitions.

(a) Cable system or cable television system A facility consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include:

(1) A facility that services only to retransmit the television signals of one or more television broadcast stations;

(2) A facility that serves subscribers without using any public right-of-way;

(3) A facility of a common carrier which is subject, in whole or in part, to the provisions of Title II of the Communications Act of 1934, as amended, except that such facility shall be considered a cable system to the extent such facility is used in the transmission of video programming directly to subscribers, unless the extent of such use is solely to provide interactive on-demand services;

(4) An open video system that complies with section 653 of the Communications Act; or

(5) any facilities of any electric utility used solely for operating its electric utility systems.

Note: The provisions of Subparts D and F of this part shall also apply to all facilities defined previously as cable systems on or before April 28, 1985, except those that serve subscribers without using any public right-of-way

* * * * *

(ff) Cable service. The one-way transmission to subscribers of video programming, or other programming service; and, subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service. For the purposes of this definition, "video programming" is programming provided by, or generally considered comparable to programming provided by, a television broadcast station; and, "other

programming service" is information that a cable operator makes available to all subscribers generally.

* * * * *

3. Section 76.309 is amended by revising paragraph (c)(3)(i)(B) to read as follows:

Sec. 76.309 Customer service obligations.

* * * * *

(c)(3)(i)(B) Customers will be notified of any changes in rates, programming services or channel positions as soon as possible in writing. Notice must be given to subscribers a minimum of thirty (30) days in advance of such changes if the change is within the control of the cable operator. In addition, the cable operator shall notify subscribers thirty (30) days in advance of any significant changes in the other information required by the preceeding paragraph. Notwithstanding any other provision of Part 76, a cable operator shall not be required to provide prior notice of any rate change that is the result of a regulatory fee, franchise fee, or any other fee, tax, assessment, or charge of any kind imposed by any Federal agency, State, or franchising authority on the transaction between the operator and the subscriber.

5. A new Section 76.505 is added to read as follows:

Sec. 76.505 Prohibition on buy outs.

(a) No local exchange carrier or any affiliate of such carrier owned by, operated by, controlled by, or under common control with such carrier may purchase or otherwise acquire directly or indirectly more than a 10 percent financial interest, or any management interest, in any cable operator providing cable service within the local exchange carrier's telephone service area.

(b) No cable operator or affiliate of a cable operator that is owned by, operated by, controlled by, or under common ownership with such cable operator may purchase or otherwise acquire, directly or indirectly, more than a 10 percent financial interest, or any management interest, in any local exchange carrier providing telephone exchange service within such cable operator's franchise area.

(c) A local exchange carrier and a cable operator whose telephone service area and cable franchise area, respectively, are in the same market may not enter into any joint venture or partnership to provide video programming directly to subscribers or to provide telecommunications services within such market.

(d) Exceptions:

(1) Notwithstanding paragraphs (a), (b), and (c) of this section, a local exchange carrier (with respect to a cable system located in its telephone service area) and a cable operator (with respect to the facilities of a local exchange carrier used to

provide telephone exchange service in its cable franchise area) may obtain a controlling interest in, management interest in, or enter into a joint venture or partnership with the operator of such system or facilities for the use of such system or facilities to the extent that:

(i) Such system or facilities only serve incorporated or unincorporated -

(A) Places or territories that have fewer than 35,000 inhabitants; and

(B) Are outside an urbanized area, as defined by the Bureau of the Census; and

(ii) In the case of a local exchange carrier, such system, in the aggregate with any other system in which such carrier has an interest, serves less than 10 percent of the households in the telephone service area of such carrier.

(2) Notwithstanding paragraph (c) of this section, a local exchange carrier may obtain, with the concurrence of the cable operator on the rates, terms, and conditions, the use of that part of the transmission facilities of a cable system extending from the last multi-user terminal to the premises of the end user, if such use is reasonably limited in scope and duration, as determined by the Commission.

(3) Notwithstanding paragraphs (a) and (c) of this section, a local exchange carrier may obtain a controlling interest in, or form a joint venture or other partnership with, or provide financing to, a cable system (hereinafter in this paragraph referred to as "the subject cable system") if:

(i) The subject cable system operates in a television market that is not in the top 25 markets, and such market has more than 1 cable system operator, and the subject cable system is not the cable system with the most subscribers in such television market;

(ii) The subject cable system and the cable system with the most subscribers in such television market held on May 1, 1995, cable television franchises from the largest municipality in the television market and the boundaries of such franchises were identical on such date;

(iii) The subject cable system is not owned by or under common ownership or control of any one of the 50 cable system operators with the most subscribers as such operators existed on May 1, 1995; and

(iv) The system with the most subscribers in the television market is owned by or under common ownership or control of any one of the 10 largest cable system operators as such operators existed on May 1, 1995.

(4) paragraph (a) of this section does not apply to any cable system if:

(i) The cable system serves no more than 17,000 cable subscribers, of which no less than 8,000 live within an urban area, and no less than 6,000 live within a nonurbanized area as

of June 1, 1995;

(ii) The cable system is not owned by, or under common ownership or control with, any of the 50 largest cable system operators in existence on June 1, 1995; and

(iii) The cable system operates in a television market that was not in the top 100 television markets as of June 1, 1995.

(5) Notwithstanding paragraphs (a) and (c) of this section, a local exchange carrier with less than $100,000,000 in annual operating revenues (or any affiliate of such carrier owned by, operated by, controlled by, or under common control with such carrier) may purchase or otherwise acquire more than a 10 percent financial interest in, or any management interest in, or enter into a joint venture or partnership with, any cable system within the local exchange carrier's telephone service area that serves no more than 20,000 cable subscribers, if no more than 12,000 of those subscribers live within an urbanized area, as defined by the Bureau of the Census.

(6) The Commission may waive the restrictions of paragraphs (a), (b), or (c) of this section only if:

(i) The Commission determines that, because of the nature of the market served by the affected cable system or facilities used to provide telephone exchange service-

(A) The affected cable operator or local exchange carrier would be subjected to undue economic distress by the enforcement of such provisions;

(B) The system or facilities would not be economically viable if such provisions were enforced; or

(C) The anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served; and

(ii) The local franchising authority approves of such waiver.

(e) For purposes of this section, the term "telephone service area" when used in connection with a common carrier subject in whole or in part to title II of this Act means the area within which such carrier provided telephone exchange service as of January 1, 1993, but if any common carrier after such date transfers its telephone exchange service facilities to another common carrier, the area to which such facilities provide telephone exchange service shall be treated as part of the telephone service area of the acquiring common carrier and not of the selling common carrier.

6. Section 76.605 is amended by revising paragraph (b) Note 6 to read as follows:

Sec. 76.605 Technical standards.

* * * * *

Note 6: No State or franchising authority may prohibit, condition, or restrict a cable system's use of any type of subscriber equipment or any transmission technology.

7. Section 76.701 is amended by adding new paragraph (i) to read as follows:

Sec. 76.701 Leased access channels.

* * * * * *

(i) The preceding paragraphs apply to any leased access program or portion of a leased access program which the cable operator reasonably believes contains obscenity, indecency, or nudity.

8. Section 76.702 is amended to read as follows:

Sec. 76.702 Public, educational and governmental access.

Any cable operator may prohibit the use on its system of any channel capacity of any public, educational, or governmental access facility for any programming which contains nudity, obscene material or indecent material as defined in § 76.701(g), or material soliciting or promoting unlawful conduct. For purposes of this section, "material soliciting or promoting unlawful conduct" shall mean material that is otherwise proscribed by law. A cable operator may require any access user, or access manager or administrator agreeing to assume the responsibility of certifying, to certify that its programming does not contain any of the materials described above and that reasonable efforts will be used to ensure that live programming does not contain such material

9. Section 76.905 is amended by adding new paragraph (b)(4) to read as follows:

Sec. 76.905 Standards for identification of cable systems subject to effective competition.

* * * * *

(4) A local exchange carrier or its affiliate (or any multichannel video programming distributor using the facilities of such carrier or its affiliate) offers video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator which is providing cable service in that franchise area, but only if the video programming services so offered in that area are comparable to the video programming services provided by the unaffiliated cable operator in that area.

10. Section 76.933 is amended by revising paragraphs (e) and (g)(5) to read as follows:

Sec. 76.933 Franchising authority review of basic cable rates and equipment costs.

* * * * *

(e) Notwithstanding the foregoing, when the franchising authority is regulating basic service tier rates, a cable operator that sets its rates pursuant to the quarterly rate adjustment system pursuant to Section 76.922(d) may increase its rates for basic service to reflect the imposition of, or increase in, franchise fees or Commission cable television system regulatory fees imposed pursuant to 47 U.S.C. § 159. For the purposes of paragraphs (a) through (c) of this section, the increased rate attributable to Commission regulatory fees or franchise fees shall be treated as an "existing rate", subject to subsequent review and refund if the franchising authority determines that the increase in basic tier rates exceeds the increase in regulatory fees or in franchise fees allocable to the basic tier. This determination shall be appealable to the Commission pursuant to Section 76.944. When the Commission is regulating basic service tier rates pursuant to Section 76.945 or cable programming service rates pursuant to Section 76.960, an increase in those rates resulting from franchise fees or Commission regulatory fees shall be reviewed by the Commission pursuant to the mechanisms set forth in Section 76.945. A cable operator must adjust its rates to reflect decreases in franchise fees or Commission regulatory fees within the periods set forth in Section 76.922(d)(3)(i),(iii).

* * * * * *

(5) Notwithstanding the foregoing, when the franchising authority is regulating basic service tier rates, a cable operator may increase its rates for basic service to reflect the imposition of, or increase in, franchise fees. The increased rate attributable to Commission regulatory fees or franchise fees shall be subject to subsequent review and refund if the franchising authority determines that the increase in basic tier rates exceeds the increase in regulatory fees or in franchise fees allocable to the basic tier. This determination shall be appealable to the Commission pursuant to Section 76.944. When the Commission is regulating basic service tier rates pursuant to Section 76.945 or cable programming service rates pursuant to Section 76.960, an increase in those rates resulting from franchise fees or Commission regulatory fees shall be reviewed by the Commission pursuant to the mechanisms set forth in Section 76.945.

* * * * *

11. Section 76.950 is revised to read as follows:

Sec. 76.950 Complaints regarding cable programming service rates.

(a) A franchising authority may file with the Commission a complaint challenging the reasonableness of its cable operator's rate for cable programming service, or the